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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

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9 Linden Winston Graham,

10 Petitioner,

11 vs.

12 Alberto Gonzales, et al.,

13 Respondents.

) No. CV 04-2796-PHX-EHC

) **TRANSFER ORDER**

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16 Pending before the Court are Petitioner's Motion for Permanent Restraint Order (Doc.

17 #9), Respondents' Motion to Transfer (Doc. #11), Petitioner's Motion to File Late Response

18 (Doc. #18) Petitioner's Motion to Appoint Investigator (Doc. #22) and Petitioner's Motion

19 to Compel Discovery (Doc. #24). Petitioner's Motion to File Late Response will be granted.

20 Respondents' Motion to Transfer will also be granted and this action will be transferred to

21 the United States Court of Appeals for the Ninth Circuit pursuant to the REAL ID Act of

22 2005.

23 **BACKGROUND**

24 On December 6, 2004, Petitioner Linden Winston Graham (A24-594-709), who is

25 confined in the Eloy Detention Center in Eloy, Arizona, filed a *pro se* Petition for Review

26 Pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1252(b)(5). On June 14, 2005, the Court

27 granted Petitioner's request for leave to file an amended petition. The Court also granted a

28 temporary stay of removal which was to remain in effect pending further order if Petitioner

1 filed a proper motion for stay of removal by June 28, 2005. Because Petitioner filed a  
2 Motion for Permanent Restraint Order (Doc. #9) on June 24, 2005, seeking a stay of removal,  
3 the temporary stay of removal previously entered by the Court remains in effect.

4 In his Amended Petition (Doc. #6), Petitioner alleges that an immigration judge  
5 entered an order for his removal to Jamaica, but that the Board of Immigration Appeals  
6 ("BIA") subsequently remanded the matter to the immigration judge for a second hearing on  
7 Petitioner's claim that he is a citizen of the United States. Following the second hearing, the  
8 immigration judge again found petitioner removable to Jamaica. Petitioner claims that "his  
9 Due Process Rights in deportation proceedings were violated" and that the immigration  
10 judge's removal decision is improper because an immigration official falsely testified that  
11 Petitioner admitted that he was born in Jamaica during an interview in a California prison.  
12 Amended Petition at 13-14.

### 13 MOTION TO TRANSFER

14 Respondents have filed a Motion to Transfer (Doc. #11) arguing that the Court's  
15 jurisdiction over this matter has been eliminated by the enactment of the REAL ID Act of  
16 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Respondents request that this  
17 action be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to  
18 § 106(c) of the REAL ID Act.

19 As amended by the REAL ID Act, 8 U.S.C. § 1252(a)(5) now provides in relevant  
20 part:

21 (5) EXCLUSIVE MEANS OF REVIEW. – Notwithstanding any other  
22 provision of law (statutory or nonstatutory), including section 2241 of title 28,  
23 United States Code, or any other habeas corpus provision, and sections 1361  
24 and 1651 of such title, a petition for review filed with an appropriate court of  
appeals in accordance with this section shall be the sole and exclusive means  
for judicial review of an order of removal entered or issued under any  
provision of this Act, except as provided in subsection (e).

25 REAL ID Act §106(a)(1)(B). By this amendment, Congress has deprived this Court of  
26 habeas corpus jurisdiction to review an order of removal entered under the Immigration and  
27 Nationality Act. Moreover, § 106(b) of the REAL ID Act provides that § 106(a) of the Act  
28 is retroactive: "subsection (a) shall take effect upon the date of enactment of this division and

1 shall apply to cases in which the final administrative order of removal, deportation, or  
 2 exclusion was issued before, on, or after the date of enactment.” REAL ID Act § 106(b).

3 In addition to stripping the district courts of jurisdiction to review orders of removal,  
 4 the REAL ID Act also “restored judicial review of constitutional claims and questions of law  
 5 presented in petitions for review of final removal orders” in the courts of appeals.  
 6 Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005). Under the prior version of  
 7 8 U.S.C. § 1252(a)(2)(C), the courts of appeals were deprived of jurisdiction to review  
 8 removal orders entered against certain criminal aliens. But § 106(a)(1)(A)(iii) of the REAL  
 9 ID Act restored jurisdiction in the courts of appeals to review removal orders entered against  
 10 criminal aliens:

11 (D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS. – Nothing in  
 12 subparagraph (B) or (C), or in any other provision of this Act (other than this  
 13 section) which limits or eliminates judicial review, shall be construed as  
 14 precluding review of constitutional claims or questions of law raised upon a  
 petition for review filed with an appropriate court of appeals in accordance  
 with this section.

15 REAL ID Act §106(a)(1)(A)(iii); Fernandez-Ruiz, 410 F.3d at 587. Additionally, § 106(c)  
 16 of the REAL ID Act provides that if any § 2241 habeas corpus case “challenging a final  
 17 administrative order of removal . . . is pending in a district court on the date of enactment,  
 18 then the district court shall transfer the case . . . to the [appropriate] court of appeals.” REAL  
 19 ID Act §106(c).

20 Respondents argue that because Petitioner challenges immigration proceedings that  
 21 resulted in a final order of removal,<sup>1</sup> this Court lacks jurisdiction and must transfer the case  
 22 to the United States Court of Appeals for the Ninth Circuit under § 106(c) of the REAL ID  
 23 Act. Petitioner opposes Respondents’ Motion to Transfer on the grounds that his underlying  
 24 petition “is not challenging his final administrative order.” Opposition to Respondents  
 25 Motion To Transfer (Doc. #13) at 1. But he also asserts that his claim in this action is that  
 26 he “is not subject to the authority of been [sic] placed in any removal hearings without  
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28 <sup>1</sup> The BIA affirmed the immigration judge’s second removal order on September 13,  
 2004.

1 renunciation [sic] of his United States Citizenship.” *Id.* at 2. In his Amended Petition in  
 2 this action, Petitioner challenges his removal proceedings on the grounds that he is a citizen  
 3 of the United States. Because those proceedings resulted in a final order of removal, the  
 4 Court finds that Petitioner is effectively challenging a final order of removal.

5 Petitioner also notes that on May 25, 2005, he filed a separate petition with this Court  
 6 expressly challenging his final order of removal. *See Graham v. Gonzalez*, CV 05-1559-  
 7 PHX-EHC (MS) (D. Ariz. petition filed May 25, 2005). Petitioner argues that only that case,  
 8 not this case, challenges his final order of removal. But if the Court were to accept  
 9 Petitioner’s argument on this point, Petitioner would probably be left without any avenue for  
 10 judicial review of his removal order. That is so because §106(a)(1)(B) of the REAL ID Act  
 11 stripped this Court of jurisdiction to review Petitioner’s removal order in both this case and  
 12 in CV 05-1559-PHX-EHC (MS). Moreover, because the petition in CV 05-1559-PHX-EHC  
 13 (MS) was filed after the effective date of the REAL ID Act, it is not subject to transfer under  
 14 §106(c) of the Act. REAL ID Act §106(c) (if a § 2241 habeas corpus case “**is pending in**  
 15 **a district court on the date of enactment**, then the district court shall transfer the case . . .  
 16 to the [appropriate] court of appeals”) (emphasis added). Thus, if the Court were to accept  
 17 Petitioner’s argument that this case is not subject to transfer under the REAL ID Act, neither  
 18 case would be subject to transfer and both cases would have to be dismissed for lack of  
 19 jurisdiction. Transfer of the instant action to the court of appeals as a petition for review  
 20 from a final order of removal appears to be the only way to preserve Petitioner’s right to  
 21 judicial review of the removal order.<sup>2</sup>

22 Accordingly, Respondents’ Motion to Transfer will be granted and this action will be  
 23 transferred to the United States Court of Appeals for the Ninth Circuit. Because Petitioner’s  
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25 <sup>2</sup> Additionally, the Court notes that even if transfer of this action were not required  
 26 under the REAL ID Act, transfer would be appropriate under 28 U.S.C. § 1636 because the  
 27 courts of appeals retain exclusive jurisdiction under 8 U.S.C. § 1252(b)(5) to review a claim  
 28 by a criminal alien in removal proceedings that he is a citizen of the United States.  
*Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002); *Baeta v. Sonchik*, 273 F.3d 1261,  
 1264-5 (9th Cir. 2001).

1 request for a stay of removal (Doc. #9) is still pending, the transfer of this action to the Ninth  
2 Circuit triggers a temporary stay of removal under Ninth Circuit General Order 6.4(c)(1).  
3 See Mariscal-Sandoval v. Ashcroft, 370 F.3d 851, 854 (9th Cir. 2004) (filing of a petition for  
4 review and request for stay of removal caused a temporary stay to automatically issue).

5 **IT IS THEREFORE ORDERED** Petitioner's Motion to File Late Response (Doc.  
6 #18) is **granted**. Petitioner's Motion to Appoint Investigator (Doc. #22) and Motion to  
7 Compel Discovery (Doc. #24) are **denied** as moot.

8 **IT IS FURTHER ORDERED** that Respondents' Motion to Transfer (Doc. #11) is  
9 **granted** and the Petition and this action shall be **transferred as a petition for review** to the  
10 United States Court of Appeals for the Ninth Circuit pursuant to § 106(c) of the REAL ID  
11 Act of 2005. The Clerk of Court shall transfer this action forthwith.

12  
13 DATED this 23<sup>rd</sup> day of September, 2005.

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Earl H. Carroll  
17 United States District Judge  
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